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June 11, 2001

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: PUBLIC VERSION; Confidential Comments Filed in CC Docket No. 96-98

Dear Ms.Salas:

Please find enclosed an original and seven copies of a public version of comments filed by Cbeyond Communications, LLC ("Cbeyond"), CTC Exchange Services, Inc. ("CTC Exchange"), e.spire Communications, Inc. ("e.spire"), Intermedia Communications Inc. ("Intermedia"), KMC Telecom Holdings, Inc. ("KMC"), Net2000 Communications, Inc. ("Net2000"), and NuVox, Inc. ("NuVox") (collectively, the "CLEC Coalition"). These comments are being submitted in response to the Commission's Public Notice requesting comment on the above-captioned petition filed by BellSouth, SBC and Verizon.[1]

The version of comments attached to this letter contain a redacted, public version of a confidential attachment. The attached comments are for public inspection.

Under a separate cover letter, the CLEC Coalition is submitting a confidential version of the comments. The confidential version of the comments are not for public inspection.

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[1] *Pleading Cycle Established for Comments on Joint Petition of BellSouth, SBC and Verizon*, CC Docket No. 96-98, Public Notice, DA 01-911 (rel. Apr. 10, 2001) ("*Public Notice*"); *Common Carrier Bureau Grants Motion for Extension of Time for Filing Comments and Reply Comments on BOC Joint Motion Regarding Unbundled Network Elements*, CC Docket No. 96-98, Public Notice, DA 01-1041 (rel. Apr. 23, 2001).

If you have any questions or need any further information regarding the filing of these comments, please contact me at (202) 887-1249.

Sincerely,

Brad E. Mutschelknaus
John J. Heitmann
David C. Kirschner

Counsel for Cbeyond Communications, LLC; CTC Exchange Services, Inc.; e.spire Communications, Inc.; Intermedia Communications Inc.; KMC Telecom Holdings, Inc.; Net2000 Communications Services, Inc.; and NuVox, Inc.

Enclosures

PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local	)	
Competition Provisions of the	)	CC Docket No. 96-98
Telecommunications Act of 1996	)	
	)	
Joint Petition of BellSouth, SBC and Verizon	)	
For Elimination of Mandatory Unbundling of	)	
High-Capacity Loops and Dedicated Transport	)	

JOINT COMMENTS OF CBEYOND COMMUNICATIONS, LLC; CTC EXCHANGE SERVICES, INC.; E.SPIRE COMMUNICATIONS, INC.; INTERMEDIA COMMUNICATIONS INC.; KMC TELECOM HOLDINGS, INC.; NET2000 COMMUNICATIONS SERVICES, INC.; AND NUVOX, INC.

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June 11, 2001

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[1] The CLEC Coalition members consist of facilities-based CLECs with diverse networks and business plans. The CLEC Coalition members also endorse the Comments filed today by the Competitive Telecommunications Association ("CompTel"). The Association for Local Telecommunications Services ("ALTS") also opposes the RBOC Petition and supports the positions expressed herein. The CLEC Coalition, CompTel and ALTS stand united in opposition to the RBOC Petition.

[2] *Pleading Cycle Established for Comments on Joint Petition of BellSouth, SBC and Verizon*, CC Docket No. 96-98, Public Notice, DA 01-911 (rel. Apr. 10, 2001) ("*Public Notice*"); *Common Carrier Bureau Grants*

. . . *Continued*

INTRODUCTION AND SUMMARY

The RBOCs' Joint Petition presents the Commission with a simple and effective opportunity for *enforcement*. In its *UNE Remand Order*, the Commission adopted the unbundling rules challenged by the RBOCs in their Joint Petition, and determined that it would review petitions seeking to remove UNEs from the national list only on a triennial basis. Not liking the triennial review rule much, the RBOCs have chosen to ignore it.

The Commission promptly should respond by denying the RBOCs' untimely petition for reconsideration or review and equally unfounded secondary effort to recast the Petition as a petition for forbearance from or waiver of the Commission's rules implementing a statute which Congress explicitly instructed the Commission not to forbear from. Indeed, there could be no better time than the present for the Commission to step up and say: *we mean what we say – our rules, including those which establish procedures for modifying them, are to be obeyed.*

Due process requires enforcement of the Commission's triennial review rule. The triennial review process is a product of sound decision-making. The climate of certainty created by the rule is essential to the implementation of CLEC business plans and it ought not be abandoned (let alone on so flimsy a basis) at this critical stage in the development of facilities-based competition.

With capital markets perilously tight, the Commission needs to send a strong signal to the industry and investors that it is committed to its rules implementing the pro-competitive provisions of the Telecommunications Act of 1996. Thus, the Commission should act promptly

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Motion for Extension of Time for Filing Comments and Reply Comments on BOC Joint Motion Regarding Unbundled Network Elements, CC Docket No. 96-98, Public Notice, DA 01-1041 (rel. Apr. 23, 2001).

to deny the RBOC Petition before any more damage is done by the mere filing and further consideration of it.

Aside from failing on procedural grounds, the RBOC Petition fails to provide verified, accurate or relevant evidence upon which the Commission could vacate its high capacity loop and dedicated transport unbundling rules. Indeed, the Commission's *UNE Remand* conclusions requiring ILECs to provide unbundled access to high capacity loops and dedicated transport remain sound. As demonstrated in the attached affidavits prepared by representatives of Cbeyond, CTC Exchange, KMC and NuVox, ubiquitous and cost-effective alternatives – including self-provisioning and third-party wholesale sources – to ILEC high capacity loop and dedicated transport UNEs simply do not yet exist. Accordingly, facilities-based CLECs would be impaired without unbundled access to ILEC high capacity UNEs. The RBOC Petition and its appended compilation of lists, tallies and sound-bites does not and cannot demonstrate otherwise.

The facilities-based competitors joining in these comments take particular issue with the RBOCs' spurious argument that "too much" unbundling deters facilities-based competition and investment in broadband facilities. By incorporating UNEs into their business plans, the facilities-based members of the CLEC Coalition have been able to efficiently (in many cases) extend the reach of their networks. Today, they bring more bandwidth capable of supporting advanced services to customers whose needs previously were under-served by the ILECs.

Contrary to the RBOCs' rhetoric, high capacity loop and transport unbundling requirements do not deter additional deployment of the high capacity facilities necessary to deliver advanced services and broadband applications. Instead, the Commission's unbundling requirements maximize the number of end users having access to these facilities.

The RBOCs' real goal is transparent. They seek to protect their enormous special access profits (a significant degree of which is attributable to CLECs that have been denied access to UNEs). However, there is no valid public policy goal to be served by aiding and abetting the RBOCs' dependence on special access profits. Once again, the Commission should reject RBOC attempts to harm consumers and competitors by forcing "too little" reliance on UNEs and "too much" reliance on ILEC special access.

Although the CLEC Coalition believes that the RBOC Petition is untimely filed and procedurally flawed, the Commission strongly should consider taking additional pro-competitive action, should it choose to respond to the petition by issuing a notice of proposed rulemaking. There are several measures the Commission could adopt to ensure greater compliance with and easier enforcement of its own rules. Such steps also would be consistent with the Section 706 mandate requiring the Commission to facilitate the deployment of advanced services. Included in the tools the Commission may wish to consider adopting are:

- National guidelines for presumptively reasonable UNE provisioning intervals – including an FCC audit/review mechanism for reviewing ILEC claims that performance at longer intervals is defensible;

- National guidelines for presumptively reasonable UNE pricing levels – including an FCC audit/review mechanism for reviewing ILEC claims that prices in excess of the guidelines are defensible;

- National guidelines for an ILEC performance assurance plan – including the requirement that ILECs must agree to include a plan that comports with the national standard in their interconnection agreements with CLECs; and

- Proactive FCC compliance/audit review team and ombudsman to promote greater compliance with the Commission's rules and quick resolution of disputes attributable to the imbalance of bargaining power enjoyed by BellSouth, Verizon, SBC and the other ILECs.

Each of these measures would promote facilities-based competition, the deployment of advanced services, and the greater public interest. Consumers benefit from more competition and not from more ILEC special access profits.

ARGUMENT

I. DUE PROCESS REQUIRES ENFORCEMENT OF THE COMMISSION'S TRIENNIAL REVIEW RULE – THE RBOC PETITION PROMPTLY SHOULD BE DENIED

There are many compelling reasons why the RBOC Petition must be denied. However, perhaps none is more compelling than the fact that the Petition is grossly premature. Indeed, the Petition ignores Commission precedent establishing a triennial review procedure for modifying its national list of UNEs.[3] That the RBOCs would ignore the Commission's rules, and would do so in such a brash manner, should now come as no surprise. Here, they do so without even so much as the threat of a monetary "slap on the wrist" (which SBC and Verizon predictably and repeatedly have proven is merely a cost of doing business for them).

There could be no better time than now for the Commission to respond to the RBOCs with a strong and clear message: we mean what we say – our rules, including those which establish procedures for modifying them, are to be obeyed. This really is a matter of enforcement. The CLEC Coalition respectfully urges the FCC to promptly enforce its triennial review rule before more harm is done.[4]

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[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking, FCC 99-238, ¶ 151 (rel. Nov 5, 1999) ("*UNE Remand Order*").

[4] The filing of the Petition alone discourages investment and diverts resources that otherwise would be engaged in realizing competitive business plans.

It is unfortunate that the RBOCs successfully have forced yet another drain of competitors' increasingly scarce resources (not to mention the Commission's) by advancing their frivolous Petition to the comment and reply stage. Even more unfortunate is the cloud of doubt that has replaced the certainty enshrined in the Commission's triennial review process. In effect, the RBOCs have upended the FCC's triennial review rule simply by filing a petition.[5] Due process requires swift and effective enforcement. Once again, the CLEC Coalition urges the Commission to put an end to this by granting the Motion to Dismiss filed by NewSouth on April 25, 2001.[6]

A. The Commission's Triennial Review Process Is Sound and Should Not Be Abandoned

Little more than a year ago, the Commission's *UNE Remand Order* – and all the rules and policies adopted therein – became effective. Among the rules that became effective in February 2000, is one that establishes a triennial review of the Commission's unbundling rules.[7] Based on three years of experience and a well developed record, the Commission soundly concluded that

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5 Presciently, in adopting its triennial review period, the Commission concluded that "[e]ntertaining on an *ad hoc* basis" such a Petition as the one being entertained here, "would threaten the certainty that we believe is necessary to bring rapid competition to the greatest number of consumers" and "would undermine the goal of implementing unbundling rules that are administratively practical to apply." *UNE Remand Order*, ¶ 150. The Commission's reasoning was sound then and remains sound today.

6 The CLEC Coalition filed an *ex parte* letter in support of the Motion to Dismiss on May 22, 2001. *Letter from Brad E. Mutschelknaus, et al., Kelley Drye & Warren LLP, to Dorothy Attwood, Chief, FCC Common Carrier Bureau,* CC Docket No. 96-98 (filed May 22, 2001). Similar letters of support were filed by CompTel, on behalf of its hundreds of member companies, Mpower and Time Warner Telecom.

7 Notably, although the Commission's UNE Remand rules became effective in February 2000, it took most carriers months to negotiate interconnection agreements with ILECs that were in no particular rush to implement the Commission's rules.

modification of the national UNE list should be entertained only on a triennial basis.[8] The Commission wisely reasoned that "the rules we adopt today seek to provide a measure of certainty to ensure that new entrants and fledgling competitors can design networks, attract investment capital, and have sufficient time to implement their business plans."[9] Thus, in adopting a three-year review cycle, the Commission reasonably found that the three-year timeframe was warranted "to provide certainty to the carriers and the capital markets and should provide carriers with sufficient time to implement their plans."[10]

The RBOCs do not and cannot provide any compelling reason why these conclusions no longer remain valid or why the "quiet period" declared by the Commission now should be disturbed. Indeed, given the extraordinarily tight capital markets faced by the competitive community over the past 12-to-18 months, the Commission's rationale for providing certainty to competitors and investors is now more valid than ever. These same capital constraints also suggest that the unbundling of high capacity loop and dedicated transport UNEs are more important than ever, as few competitors currently have access to sufficient funding necessary for self-provisioning of middle and last mile broadband connectivity on anything more than a small-scale, *ad hoc* basis.

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8 *UNE Remand Order*, ¶¶ 150-51.

9 *Id.*, ¶ 150.

10 *Id.*, ¶ 151.

B. The Commission Must Decline the RBOCs' Invitation to Ignore Basic Tenets of Administrative Procedure (and Its Own Procedural Rules)

In addition to failing to offer a compelling reason for modifying the triennial review rule, the RBOCs request that the Commission ignore basic tenets of administrative procedure and its own procedural rules in order to arrive at the result they desire. Indeed, this Petition is untimely in both directions. It comes too early for the Commission's triennial review and it came too late to request reconsideration.[11] Thus, the Petition should be read as nothing more than an impermissible collateral attack on the Commission's triennial review rule. RBOC displeasure over the rule should be addressed in the context of petitions for reconsideration or review.

Even if the Commission chooses to entertain the Petition, basic tenets of administrative law do not permit the Commission to indulge the RBOCs by modifying or obviating its rules in response to what the RBOCs tellingly label "Joint Petition" and what more descriptively should be called an "(Untimely) Joint Petition for Rulemaking" or "(Untimely) Joint Petition for Reconsideration".[12] To even entertain granting the relief sought by the RBOCs, the Commission first would have to consider whether rule changes should be considered and then would have to request comments and replies on a Notice of Proposed Rulemaking. Only then, could it entertain

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[11] 47 C.F.R. § 1.429(d) (requires a petition for reconsideration to be filed within 30 days from the date of public notice of the action). The *UNE Remand Order* was published in the Federal Register on January 18, 2000. Revision of the Commission's Rules Specifying the Portions of the Nation's Local Telephone Networks that Incumbent Local Telephone Companies Must Make Available to Competitors, 65 Fed Reg. 2542 (Jan. 18, 2000). According to the FCC's rules, petitions for reconsideration were due February 17, 2000. *See* 47 C.F.R. § 1.4.

[12] 5 U.S.C. § 5.53(b); *see Nat. Res. Defense Council v. Nuclear Reg. Com'n*, 666 F.2d 595, 601 (D.C. Cir. 1981) (finding that an entity cannot do indirectly what is forbidden by statute from doing directly); *JEM Broadcasting Co., Inc. v. F.C.C.*, 22 F.3d 320, 324 (D.C. Cir. 1994).

the notion of undoing the specific unbundling rules (which remain subject to unsettled RBOC challenges elsewhere).[13]

C. The RBOCs' Stated Defenses for Ignoring the Commission's Three Year Rule Are Disingenuous and Meritless

One might expect that the RBOCs would have put together an extraordinarily compelling case to persuade the Commission that it should retire a rule so recently adopted. They did not. In fact, the Joint Petition ignores the triennial review rule. Only in response to a Motion to Dismiss did counsel for Petitioners address the rule. There, the RBOCs proffered that the Commission did not mean or could not have meant what it said, and, even if it did, the Petition is okay because the RBOCs waited roughly half the time they were supposed to and banded together so as not to bombard the Commission with separate petitions from each of the three behemoths in the group.[14] These specious arguments should not be countenanced.

1. The RBOCs' "The Commission Couldn't Have Said Three Years" Argument Ignores the Plain Language of the Order

In the RBOC Opposition to the Motion to Dismiss, the RBOCs disingenuously ignore the plain conclusions made by the Commission in paragraph 151 of the *UNE Remand Order*. Instead, they willfully put on blinders and argue that the Commission did not adopt a triennial review in

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[13] By then, it is quite possible that the triennial review, which the Commission indicated actually would commence after *two* years, timely could be launched. Even if the Commission is not inclined to curb the RBOCs by enforcing its own mandate and granting the NewSouth Motion to Dismiss, it could alleviate some of the damage caused by publicly declaring its intention to hold this matter in abeyance until the third year of the cycle commences in February 2002. To redress some of the damage already caused by the filing of the Petition, the Commission also may want to declare that the review cycle has been tolled for the period of time between the April 2001 filing of the Petition and such an announcement by the Commission.

[14] Qwest, the only other RBOC, did not join the Petition (although it apparently participated in financing the Report appended to the RBOC Petition).

paragraph 151, because to do so would be inconsistent with the Act.[15] Although specious, this argument should have been made during the *UNE Remand* comment cycle that lead to the adoption of the triennial review rule or in reconsideration or review proceedings. Nevertheless, it is unquestionable that the Commission has been charged with implementing the statutory unbundling obligations contained in Section 251 of the Act and, contrary to the RBOCs' position, has sufficient latitude to adopt rules regarding the standards contained therein and the procedures for a periodic examination of whether those standards are met.

As will be discussed in more detail below, the RBOCs premise their case for eliminating the unbundling requirements for high capacity loops and dedicated transport on their view that the Commission got it wrong in the *UNE Remand Order*.[16] Rather than following existing precedent regarding the mandatory unbundling of high capacity loops and dedicated transport, the RBOCs present an argument based on what they think the law should be. Thus, even if the accuracy, validity and relevance of the information compiled in the USTA Report[17] could be assumed (which plainly is not the case), the RBOCs do not prove that the Commission's current unbundling rules violate the statute they are intended to implement. Instead, the RBOCs draw up nothing more than an alleged violation (by the Commission) of a statute, *as they wish it had been interpreted* (and not as it actually was interpreted by the Commission). This "let's pretend things

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15 Opposition of BellSouth, SBC and Verizon, CC Docket No. 96-98, at 1 (filed May 7, 2001) ("RBOC Opposition").

16 *E.g.*, RBOC Petition at 10 ("based on this mistaken view, the Commission concluded . . ."), 18 ("[w]hen properly understood, it is impossible for the Commission to conclude . . .").

17 Competition for Special Access Service, High Capacity Loops, and Interoffice Transport, *submitted by the United States Telecom Association, prepared by Kellogg Huber, et al.*, Apr. 5, 2001, RBOC Petition, Attachment B ("USTA Report").

were different" line of argument is hardly compelling. Moreover, it does not provide a reasonable basis for overturning the Commission's decision in favor of a triennial review process.

The RBOCs also argue that the Commission could not have meant to establish a triennial review because Section 161 of the Act requires a biennial review of all telecommunications-related regulations.[18] Here, too, these arguments are best deferred to reconsideration or review proceedings. Nevertheless, note 269 of the *UNE Remand Order* resolves any perceived material inconsistency between the requirements of Section 161 and the Commission's conclusions in paragraph 151 of the *UNE Remand Order*. There, the Commission concludes that the triennial review may begin after two years so that it can be completed in three-year intervals, thus leading to a result in the same timeframe as a Section 161 "biennial" review.[19] Accordingly, there is no substantive inconsistency between the Commission's "triennial" UNE review rule and the "biennial" review required by Section 161. Logistically, it appears that both reviews contemplate commencement at roughly the two-year mark and completion by approximately the start of the third.[20]

2. The RBOCs' "Well, We Didn't File Immediately and We Joined Together so as to Only Ask Once" Argument Ignores the Plain Language of the Order

The RBOCs also attempt to justify their attempt to end-run the triennial review rule by arguing that their Petition did not request removal of elements from the national list *immediately*

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18 RBOC Opposition at 2.

19 *UNE Remand Order*, ¶ 151, n.269.

20 *Id.*

upon adoption of the list by the Commission and that it constitutes only one and not *numerous* Petitions. These arguments are silly. The RBOCs ask to be rewarded for waiting barely half the time specified for commencement of the triennial review process (which actually would take place at the end of the second year) and for colluding in an effort to file a single petition as opposed to several. Such behavior is worthy of a reprimand, not a reward.

In the *UNE Remand Order*, the Commission reasoned that "it would be inconsistent with our overall policy goals to consider petitions to remove elements from the list *immediately* . . . ."[21] The Commission, then concluded that a three-year review was reasonable and rationally suited to further its overall policy goal of creating an environment conducive to the transition from monopoly to competitive local markets. The Commission did not indicate, as the RBOCs allege, that it would entertain petitions at some point prior to the three-year mark. Instead, the Commission concluded that doing so would undermine the period of business certainty it strove to create by adopting the triennial review rule.[22]

The RBOCs also strive to make too much out of the Commission's explanation that it did not wish to entertain, "on an *ad hoc* basis, *numerous* petitions to remove elements from the list . . . ." The Commission's explicit adoption of a triennial review process makes clear that the Commission did not intend to entertain *any ad hoc* petitions for removal of UNEs from the national list prior to the commencement of its triennial review. It takes no more than one such petition "to threaten the certainty that . . .is necessary to bring rapid competition to the greatest

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21 *Id.*, ¶ 150 (emphasis added).

22 *Id.*

number of consumers"[23] and "undermine the goal of implementing unbundling rules that are administratively practical to apply"[24].

D. The RBOCs Request Statutory Relief Which May Not Be Granted

Recognizing the procedurally defective nature of their Petition and tacitly admitting their own inability to present a compelling evidentiary case for upending Commission precedent regarding the unbundling of high capacity loops and dedicated transport, the *RBOC Opposition* requests that the Commission *forebear* from enforcing its unbundling rules or grant a compliance *waiver* with respect to the unbundling of high capacity loops and dedicated transport. With all due respect, the Commission lacks the authority to forbear or waive these statutory unbundling provisions which the RBOCs find to be unfavorable to their goal of retaining market power, preserving enormous special access profits, and retaining near-monopoly control of all aspects of the local services market. Even the RBOCs admit that "Section 10 bars the Commission from forbearing from Section 251 until that section has been 'fully implemented'".[25] Apparently recognizing that a claim of "full implementation" of Section 251 could not possibly pass the "red face test", the RBOCs suggest that instead of forbearing from Section 251, the Commission ought to *forebear from enforcing the rules* it enacted to implement that section of the Act. It is highly doubtful that such slight of hand, or similarly granting a compliance "waiver" from Section 251's unbundling obligations, would impress any appeals court asked to make sense of Congress

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23 *Id.*

24 *Id.*

25 RBOC Opposition at 6, n.6.

explicit prohibition on forbearance. Simply put, the Commission has no choice but to continue to deny RBOC requests, such as this one, to re-write the statute.

II. THE UNBUNDLING OF HIGH CAPACITY LOOPS AND DEDICATED TRANSPORT IS REQUIRED BY THE ACT

To be sure, CLECs have made progress in the time since the *UNE Remand* record was closed, the rules became effective and interconnection agreements were amended to take account of the new rules. Business plans have been modified and or developed, and networks have been deployed and are being deployed. Some consumers are beginning to realize the benefits of having a choice in local service providers. Notably, today's CLEC business plans and networks typically place a significant degree of reliance on access to high capacity loop and dedicated transport UNEs.[26] For some, if not most, CLECs, these UNEs (and combinations thereof)

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[26] Too often, special access is used as a default because ILECs unlawfully restrict access to UNEs or provision them in such an unpredictable, untimely and/or unreliable manner that CLECs cannot afford to risk using them to meet their customers needs. For example, e.spire reports that Verizon will not provision interoffice dedicated transport unless it runs between two wire centers in which e.spire is collocated Thus, e.spire is forced to order special access for all circuits that do not meet that unlawful restriction. As another example, Cbeyond and NuVox have been faced with BellSouth provisioning intervals for loop and transport UNE combinations that are roughly 4-to-5 times longer than they are for corresponding special access services. Not having the luxury of making their customers wait (as the ILECs often do), Cbeyond and NuVox often are forced to order special access. In fact, Cbeyond filed a complaint with the Georgia Public Service Commission on April 9, 2001 (Docket No. 13382) concerning BellSouth's discriminatory provisioning intervals for DS1 UNE combinations, DS1 interoffice transport, and DS1 local channels. NuVox has attempted to begin converting its special access circuits to EELs, but, to date, has experienced tremendous difficulty in getting BellSouth to comply with its obligation to perform such conversions. For example, NuVox submitted to BellSouth a request to convert 843 special access circuits to UNEs on May 21, 2001. NuVox requested a June 29, 2001 completion date for the conversion (approximately 40 days). BellSouth responded that *due to a lack of resources*, it could not complete the conversion process *until the end of July at the earliest.* BellSouth then refused NuVox's request to change the billing from special access rates to UNE rates as of June 29, 2001 and has continued to insist that it is entitled to special access rates no matter how long it delays conversion. This, of course, is inconsistent with the Commission's *UNE Remand* directive that all such conversions should be performed without delay. Such delay drives up competitors' costs and exacerbates ILEC dependence on uneconomic special access profits.

. . . Continued

presently are the only economically viable means of extending long-haul backbone networks and connecting customers to metropolitan fiber rings.

As the Commission correctly concluded in the *UNE Remand Order,* current pricing levels prevent ILEC special access from being considered a reasonable alternative to UNEs.[27] As the Commission also rightly found, CLEC self-provisioning and offerings by third party alternative providers also are unable to eliminate the impairment that would be caused by denying unbundled access to high capacity loops and dedicated transport.[28] No significant developments have occurred in the past 12-to-18 months that would give the Commission cause to modify those conclusions.

Perhaps the most significant development, however, in the past 12-to-18 months is the dramatic tightening of capital markets and the increased difficulty CLECs have faced in attracting capital necessary to fund their ongoing operations and business plan implementation. The CLEC Coalition includes members that consider themselves "fully funded", members that are working to

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The ILECs also engage in unlawful gambits to drive up their competitors' costs and their own reliance on uneconomic special access profits. BellSouth, for example, despite having agreed to interconnection agreement terms with NuVox that provide for interconnection trunks and facilities at state commission approved cost-based UNE rates, is unable to provision interconnection trunks and facilities without using the ASR process. Having failed to develop a means to distinguish between interconnection requests and access requests, BellSouth historically has charged NuVox special access rates, instead of the cost-based UNE rates it is obligated to charge under the FCC's rules and the parties' interconnection agreement. BellSouth has yet to fully reform this law-breaking policy. Its current "standard" interconnection agreement requests that competitors report a "PLF" (percent local facility), so that BellSouth can use ratcheting to charge UNE rates for a portion of the trunks and facilities and special access rates on the rest. When questioned on this point, BellSouth has argued that Section 251(g) permits this approach. *See, e.g.,* BellSouth Third Quarter 2000 Standard Interconnection Agreement, Att. 3, Sec. 5.3, <http://www.interconnection.bellsouth.com/become_a_clec/ics_agreement/att03.pdf> (dated September 29, 2000) (still available on BellSouth's website as of the date of this filing).

Special access is the opium of the ILECs. It is a nasty habit financed on the backs of competitors and consumers. The Commission need not foster it by entertaining the RBOC Petition.

27 *UNE Remand Order,* ¶¶ 67, 177.

secure additional long or short-term capital, members that have substantially curtailed capital expenditures to conserve cash, one member that will be merged into a significantly larger competitor, and one member that plans to emerge from Chapter 11 bankruptcy reorganization. However, all concur that tightness in the capital markets has forced significant contraction in capital expenditure budgets. Accordingly, self-provisioning is less of an option than it was prior to the adoption of the UNE Remand Order, and the availability of UNEs – particularly those at issue here – is more important than ever to the advancement of facilities-based competition.

A. RBOC Quarrels With Commission Precedent and a Compilation of Unverified, and Largely Invalid, Inconclusive and/or Irrelevant Data Do Not Constitute Reasonable Grounds for Eliminating High Capacity UNEs

Much of the RBOCs' case relies on how the Commission was "mistaken" last time and how the public interest would be best served by limiting the market-opening, field-leveling unbundling provisions of the Act to copper loops used in the provision of POTS.[29] There is no valid basis for either contention. Accordingly, the Commission has no need to reverse itself on its unbundling rules or on any of its precedent finding that the Act is technology neutral.[30]

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[28] *Id.*, ¶¶ 165, 321.

[29] For example, the RBOCs contend that the Commission was "mistaken" and "failed to recognize . . . that 'ubiquity' for services provided using high-capacity loops to business customers means something very different than it does in the mass market for local exchange customers." RBOC Petition, at 10. The Commission probably did not recognize that point because it contorts the analytical framework established in the *UNE Remand Order* and makes little sense otherwise. The Commission conducts its unbundling analysis for facilities – not services. The Act requires unbundling of facilities for whatever telecommunications service a requesting carrier seeks to provide. Moreover, business customers are part of the "mass market" for local exchange services (as are residential customers). Section 251 does not make distinctions based on the type of customer to be served using UNEs. Nor do the Commission's rules. The RBOCs offer no compelling reason for inserting such a distinction into the statute or the Commission's rules.

[30] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 258-264 (1996) ("*Local Competition Order*"); *Deployment of Wireline*

. . . *Continued*

Neither Section 251 nor any other section of the Act (including Section 706), has been or can be interpreted so as to allow ILECs to leverage their control over middle and last mile connectivity into dominance in the developing broadband/advanced services arena.[31] Section 251 requires that all requesting carriers have access to such facilities – at cost-based rates – until they no longer would be impaired from providing the services they seek to offer without it. Moreover, neither Section 251 nor any other section of the Act, has been or can be interpreted to create an unbundling exemption for the high capacity loop and dedicated transport facilities used by the RBOCs to provide their lucrative special access services. The RBOCs once again ask the Commission to find differently. Once again, their request should be denied.

As demonstrated below and in the affidavits prepared by Cbeyond, NuVox, KMC and CTC Exchange, facilities-based CLECs still would be impaired without unbundled access to high capacity loops and dedicated transport. The RBOC Petition offers little if any evidence that would be required to refute the Commission's *UNE Remand* findings requiring the unbundling of high capacity loops and dedicated transport. Indeed, the RBOCs are unable to demonstrate that CLECs are able to self provision these high capacity UNEs in a manner that would offset the ubiquity, cost, timeliness and other advantages currently shared (albeit to a limited degree) via the Commission's unbundling rules. Likewise, the RBOCs fail to demonstrate that third party-

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Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, ¶¶ 11, 41 (1998) ("*Advanced Services MO&O*"); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761, ¶ 15 (1999); *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 2001 Lexis 413, ¶ 10 (Jan. 19, 2001).

31 *See Advanced Services MO&O*, 13 FCC Rcd 24011, ¶ 52-56, 69-77.

provisioned alternatives are available with ubiquity, cost, timeliness or even the quality of ILEC UNEs. Instead, the RBOCs rely on a compilation of press releases, news reports, financial documents and various other sources in order to present and manipulate figures intended to portray a vibrant wholesale marketplace in which carriers readily self-provision or acquire high capacity network elements from third party providers.

As AT&T and others demonstrated in their reply comments filed on April 30, 2001, in the so-called "use of unbundled network elements to provide exchange access services" proceeding in this same docket, the USTA Report "is an evidentiary farce".[32] A sizable amount of the network deployment touted by the ILECs is comprised of facilities that they have leased to CLECs.[33] While that demonstrates that CLECs are investing heavily to piece together networks, it provides no support for the RBOCs' contention that high capacity facilities are readily self-deployed or obtained at a competitive price in a vibrant wholesale market.

The ILECs also engage in a significant amount of double counting and over-counting. For example, the building access figures compiled by the RBOCs appear to count a building as another separate building each time a different CLEC serves a customer in the building (and perhaps even when a CLEC merely gains the right via contract to enter a building).[34] The Report

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32 AT&T Reply Comments on the Use of Unbundled Network Elements to Provide Exchange Access Services, CC Docket 96-98, at iii-v, 16-29 (filed Apr. 30, 2001) ("AT&T Reply Comments"); *see also, e.g.,* Focal Reply Comments on the Use of Unbundled Network Elements to Provide Exchange Access Services, CC Docket 96-98, at 4-5 (filed Apr. 30, 2001); WorldCom Reply Comments on the Use of Unbundled Network Elements to Provide Exchange Access Services, CC Docket 96-98, at 6-8 (filed Apr. 30, 2001); Sprint Reply Comments on the Use of Unbundled Network Elements to Provide Exchange Access Services, CC Docket 96-98, at 3-5 (filed Apr. 30, 2001).

33 *Id.*

34 *Id.*, at 24-27.

also does not appear to distinguish between self-provisioned loops, UNE loops, or special access circuits used to connect end users to CLEC fiber.[35]

Aside from being riddled with inaccuracies and manipulations, the Report largely relies on unverified and unsubstantiated data. For example, "Internal company data" is cited as the source for Tables 1 and 2, the Report cited itself as the source for Table 3 (and then acknowledges conflicting data from another unverified report), and no source is cited for Tables 4 and 5. This is hardly the type of material upon which rule changes could be based.

The deficiencies do not stop with the numbers presented. Even more troubling is how the RBOCs attempt to use them. Lists of CLEC fiber/route miles, fiber rings and addressable commercial buildings do not constitute evidence of a competitive marketplace. Nor do they represent suitable proxies for the lack of impairment that must be demonstrated before eliminating unbundling requirements. Such lists merely confirm that facilities-based CLECs have invested heavily and the competitive entry is taking place, particularly in the largest metropolitan areas. Similarly, lists of the number of collocations provisioned provide little insight into the feasibility of self-provisioning or the availability of alternative transport. Indeed, the ILECs generally do not permit CLECs to provision their own loops out of collocations and many limit CLECs' ability to cross-connect to third-party providers (either by refusing to allow them or by inserting themselves into the process at excessive prices), even if such a party had transport capacity to sell

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[35] *Id.*

on a needed route and at a price that was closer to UNE pricing and further from ILEC special access pricing.[36]

Simply put, the figures and press release/marketing material clippings produced by the ILECs do not demonstrate that competitive carriers readily and economically can self-provision high capacity loop and transport facilities or readily obtain them from third-party providers at costs that approximate the TELRIC prices established for UNEs. Indeed, the RBOCs provide almost no useful evidence on any of the criteria examined under the Commission's impairment test. Their pleading contains no study of competitors' costs of self-provisioning high capacity loops and dedicated transport and no analysis demonstrating how those costs rationally could be incurred (even if competitors possessed sufficient capital to expend or had access to spectacular guaranteed revenue streams like the ILECs do). Similarly, the RBOC Petition presents no study demonstrating the degree to which a viable, vibrant wholesale markets has developed. If it had, one would expect to see significant and geographically widespread downward pressure on ILEC special access prices and aggressive use of pricing flexibility in response to competitive pressures in particular markets.[37] The day a viable wholesale market arrives will be the day that ILECs fight to keep CLEC traffic on their networks by offering better and more predictable provisioning at prices that are much closer to TELRIC than today's special access prices. Of course, no such demonstration has been or can be made at the present time.

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[36] Indeed, without unbundled access to high capacity UNEs, there would be little reason for any CLEC to collocate in an ILEC end office.

[37] Although the RBOCs have been granted widespread special pricing flexibility (under a lenient standard that is distinct from the unbundling standard contained in the Act), there is no evidence that they have used the flexibility granted to reduce prices in any significant way. If a vibrant competitive market had developed the

. . . *Continued*